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IN THE

Supreme Court of the United States

October Term, 1960.

No. 528.

COUNTY OF LAWRENCE, CITY OF NEW CASTLE, CITY OF NEW CASTLE SCHOOL DISTRICT, COUNTY OF LAWRENCE INSTITUTION DISTRICT,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States Court of Appeals for the Third Circuit.

BRIEF OF APPELLANTS OPPOSING MOTION TO AFFIRM.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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The United States in its Motion to Affirm contends quite simply and consistently with its previous briefs that the possession of bare legal title by the United States prohibits any local tax whatsoever and that no further inquiry into the matter need be made.

> "In the case now before the Court, record legal title for the tax period involved was indisputably in the United States, and thus it becomes crystal clear that this case was correctly decided in the Court of Appeals."
>
> (Appellee's Motion to Affirm, P. 4.)

In support of this effort to ring down the iron curtain on any discussion of the uses to which the property may be put, Appellee cites two cases. Both are discussed below.

In *Rohr Corp. v. San Diego County*, 362 U. S. 628, 4 L. Ed. 2nd 1002, property owned by the Reconstruction Finance Corporation, and thus subject to local tax by express waiver of immunity, was declared surplus to the Reconstruction Finance Corporation's needs and custody transferred to the War Assets Administration. The latter leased the property to Rohr Aircraft, the lease stating that "the Department of the Air Force has determined that the use of the leased premises by the Lessee [Rohr] herein is necessary for the production of military equipment for the National Defense." Local taxes were assessed on the realty against Reconstruction Finance Corporation as record owner. The Supreme Court of California held that since the R. F. C. had not deeded the property away, it remained taxable under the express waiver. This Court (Mr. Justice Clark) reversed saying "On the merits we conclude that the property involved is not within the waiver provision of the Federal Act. . . . We believe that the appropriate test would turn on practical ownership of the property rather than the naked legal title."

The arguments and decisions in the *Rohr* case were entirely directed to the question of when the waiver of immunity terminated for R. F. C. owned property. This Court held that practical ownership, not naked legal title, should govern this question and reversed what previously had been the majority view among state courts. Since the *Rohr* decision, Appellants have raised no issue in this case that the former waiver of immunity that attached to Plancor 765 prior to 1954 continued into that year. Appellee is beating a dead issue.

The *Rohr* case decides nothing as to the two issues raised by Appellants in this case.

(1) That the doctrine of intergovernmental immunity established by *McCulloch v. Maryland* (4 Wheat. 316, 4 L. Ed. 579, 1819) permits nondiscriminatory taxation of Federal owned property performing an entirely private function, and

(2) That the Pennsylvania Constitution imposes a nondiscriminatory tax on the lessees of property from exempt owners when such property is used for private purposes and that such taxes are valid under *City of Detroit v. Murray Corporation and United States of America*, 355 U. S. 489, 2 L. Ed. 2nd 441 (1958).

How could either argument have been made in the *Rohr* case in the face of the finding by the Air Force that the use of the premises by the lessee was "necessary for the production of military equipment for the National Defense"?

It is curious that Appellee, relying as it does on naked legal title, should cite the *Rohr* case, in which this Court stated that such was not the test and in which the facts and circumstances surrounding the use and disposition of the property were carefully examined as Appellants seek to have same examined in this case.

The United States also cites *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845, 6 S. Ct. 670, 1885, which does indeed appear to support the doctrine that intergovernmental immunity imposes a flat prohibition against local taxation of any sort on Federal property. Without going into detail, which should be reserved for the brief on the merits in this case, it is sufficient to say that *Van Brocklin v. Tennessee* is not in accord with more recent decisions in this Court. For example, the following is excerpted from *Graves v. New York*, 396 U. S. 466, 83 L. Ed. 927:

". . . in Helvering v. Mountain Producers Corp., 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 623, supra, . . . It was pointed out that the implied immunity of one government and its agencies from taxation by the

other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. See *Metcalf & Eddy v. Mitchell, supra* (269 U. S. 523, 524, 70 L. Ed. 392, 393, 46 S. Ct. 172); *James v. Dravo Contracting Co., supra* (302 U. S. 156-158, 82 L. Ed. 170, 171, 58 S. Ct. 208, 114 A. L. R. 318)."

At pp. 488-491 (Justice Frankfurter concurring):

"Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

"The arguments upon which *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, rested, had their roots in actuality. But they have been distorted by sterile refinements, unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *M'Culloch v. Maryland*. Partly as a flourish in rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' Id. at p. 431. This dictum was treated as though it

were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion of *M'Culloch v. Maryland.*

"All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218, 223, 72 L. Ed. 857, 859, 48 S. Ct. 451, 56 A. L. R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions [illegible] withdrew from the taxing power of the States [illegible] on a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent. . . . In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined."

These points were further emphasized in *Oklahoma Tax Commission v. Texas Co.,* 336 U. S. 342, 93 L. Ed. 721.

"Moreover the burdens of the taxes here, if any of a character likely to interfere with respondents in carrying out the terms of their leases, are as appropriately to be judged by 'regard . . . to substance

and direct effects,' and as inappropriately to be determined 'by merely theoretical conceptions of interference with the functions of government,' were those in the Mountain Producers Case.

"The Mountain Producers Case (*Helvering v. Mountain Producers, supra*) was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.

"Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

Van Brocklin v. Tennessee is an example of the type of case, now discredited, which took Chief Marshall's rhetoric literally.

In 1958, this Court decided the *Michigan* cases [1] which hold that local authorities may impose nondiscriminatory taxes on the interests of private persons in federal property which is what Pennsylvania law requires Appellants to do in the instant case. More recently this Court decided

1. *United States v. Detroit*, 355 U. S. 466, 2 L. Ed. 2nd 424; *United States v. Township of Muskegon*, 355 U. S. 484, 2 L. Ed. 2nd 436; *City of Detroit v. Murray Corporation*, 355 U. S. 489, 2 L. Ed. 441.

the converse that a discriminatory tax on such interests may not be imposed (*Phillips Chemical Company v. Dumas Independent School District*, 4 L. Ed. 2nd 384, Feb. 23, 1960. If the Court will now lay to rest the hornbook notion that *McCulloch v. Maryland* prohibits any local tax whatever simply because bare legal title is in the United States, the law on this subject will enjoy a rare symmetry and a serious injustice to local taxing bodies will be removed.

A substantial question of constitutional law is presented by this Appeal and its determination will have far-reaching effects. If private persons may conduct private business for profit under the shield of the United States' immunity from local tax, then a serious loss of tax revenues for local authorities will result which is completely unwarranted by any need of the Federal government for protection in its legitimate functions.

Relief.

Wherefore, Appellants submit that jurisdiction should be noted by the Court and the motion by Appellee to affirm be denied.

Respectfully submitted,

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